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SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 149

C. C. LEE, ETC., ET AL., - - - - Petitioners,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL., - - - - Respondents.

PETITIONERS' SUPPLEMENTAL PETITION FOR REHEARING.

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PETITIONERS SUPPLEMENTAL PETITION FOR REHEARING.

May it please the Court:

Petitioners, O. C. Lee, et als representing the 66 shop craft employees on the rosters of the South Louisville Roundhouse greatly appreciate the Court granting them time to file this Supplemental Petition for Rehearing. This is presented pursuant to that permission.

FACTS AS TO PRESENT CONTRACT NEGOTIATIONS.

The request for this right to file the Supplemental Petition was based upon notice to the membership of the four respondent unions in this action, of the controversies in regard to changes in the collective bargaining agreements between the unions and the Louisville and Nashville Railroad Company. Based upon

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suggestions made to petitioners by the Secretary of the National Mediation Board, request was made of the respondent Railroad Company for a copy of the proposals and counter proposals submitted. Counsel for the Railroad Company has been most courteous in furnishing this information to counsel for petitioners.

The pending negotiations, to which reference was made, are between several System Federations which are composed of unions representing six brotherhoods and associations of mechanical crafts of railroad employees throughout the United States. The representatives of these unions and System Federations have created an Employes' Conference Committee, composed of the President and Executive Council Members of the Railway Employes' Department, AFL-CIO.

These unions and federations presented to each of the principal railroad companies in the United States on October 15, 1962, proposals for changes in the operating agreements. One letter was sent on that date by System Federation No. 91 and the five associations and brotherhoods operating on the Louisville and Nashville Railroad to Mr. W. S. Scholl, Director of Personnel of that Company, with an "Appendix A" attached. An Appendix is also enclosed with this Supplemental Petition, with a copy of that letter and its "Appendix A", included as Item 1.

On November 15, 1962 Mr. W. S. Scholl, Director of Personnel, of the Louisville and Nashville Railroad Company, sent to the official representatives of System Federation No. 91 and the representatives of said brotherhoods and associations, including all of the

unions which are respondents in this action, a letter proposing modifications for existing rules and working conditions set out in an attachment "A" to be handled concurrently with the employees' proposals. A copy of said letter and Attachment "A" is included in the Appendix to this Petition as Item 2.

The Executive Secretary of the National Mediation Board acknowledged receipt of letters and telephone requests for copies of documents but indicated that his office was not accustomed to providing copies of documents or proceedings except to parties to specific negotiations. He referred to these negotiations as those covered by the letter of October 15, 1962 from the shop craft organizations and the counter proposals of the carriers. Petitioners appreciate his cooperation in this matter.

1. Nature of the Proposals Made by the Employees.

The changes suggested by the employee organizations were contained in the "Appendix A" mentioned above. These suggested changes are outlined in that Appendix and will be discussed more fully later.

The four requests for rule changes are well summarized in the data furnished with the Strike Ballot as follows:

> "The October 15, 1962 notice made the following requests for rule changes:
>
> "(1) That work performed by one craft shall not be transferred to officials or supervisors or employees in other crafts except by agreement between the carrier and the general chairman of the craft involved.

"(2) That work shall not be contracted out which belongs to a craft unless agreed to by the general chairman of the craft involved.

"(3) That the same type of protective provisions as are in the Washington Job Agreement shall apply to employees displaced or deprived of employment as a result of any changes in the operation of the carrier, such as transfers of work assignments, discontinuance or consolidation of facilities or services, contracting out of work, leasing or purchasing of equipment or component parts thereof, technological changes and changes of a similar character.

"(4) That the coupling and uncoupling of air, steam and signal hose, testing air brakes and appurtenances on trains or cuts of cars in yards and terminals shall be Carmens work."

2. Nature of Employers' Counter Proposals.

The additional proposals, or counter proposals, as they have been described, are contained in the Attachment "A" as mentioned. These provisions are much more general in their application and are included under seven main headings as follows:

"1. CLASSIFICATION OF WORK
2. CAR INSPECTORS
3. MODERNIZATION OF AGREEMENTS TO MEET CHANGING CONDITIONS
4. COMPULSORY RETIREMENT
5. STARTING TIME
6. CHANGE OF ARTICLE IV, AUGUST 21, 1954 NATIONAL AGREEMENT
7. GENERAL"

Proposal No. 3 of the Employee organizations involves displacement and lay-off of employees. All of the carrier proposals would affect working conditions of railway employees, but the suggestion having most applicability to issues in the pending action is No. 3 as to Modernization of Agreements. Under this provision as to modernization there are subdivisions (a) and (b), with subdivision (a) containing ten specific suggestions. The subdivision starts with this provision:

> "(a) Eliminate all agreements, rules, regulations, interpretations and practices, however established, which in any way handicap or interfere with the carrier's right to: . . ."

Subdivision (b) likewise relates to changes in methods with the first sentence reading as follows:

> "(b) Whenever the introduction of a change in methods or operation such as those set forth in paragraph (a) hereof cannot be accomplished, or where its benefits could not be fully realized without the consolidation, merger or elimination of one or more seniority districts, the carrier shall give thirty (30) days' *notice to the affected organization or organizations.*" (Italics supplied.)

The last sentence under subdivision (b) reads as follows:

> "This provision will also apply in any and all other instances where a carrier desires to consolidate, merge or eliminate one or more seniority districts.

MODERNIZATION OF AGREEMENTS.

The pleadings and briefs in this action all show that petitioners and those whom they represent had not only been employed for years by the Louisville and Nashville Railroad Company, but also that they had been employed through bargaining agreements which provide for point seniority rosters in two separate shops maintained by the Railroad Company in its South Louisville Yards. Gradually, the change in the use of power equipment from steam locomotives to diesel engines made less necessary the use of a roundhouse building and more necessary the use of pits and other equipment in railroad shops. The South Louisville Roundhouse Shops were started earlier with the Easterly shops, formerly known as the Back Shops (now as the South Louisville Shops), being started some years later. These shops have lately been developed more extensively. The division line between the two shops has been definitely recognized, and marked by a division fence which still exists in part, and which separates specific areas within the South Louisville Yards. (Exhibit "E" and "F" with Amended Complaint, R. 60-61.)

The number of personnel employed in the South Louisville Shops had been increased until they numbered at least fifteen times the number of employees in the Roundhouse Shops, prior to February 17, 1937.

Nevertheless the Railroad Company had in 1942 and 1943 made agreements which recognized the point locations for each of these separate shops, just as prior

collective bargaining agreements had. As appears in the data given to the National Railroad Adjustment Board, some buildings in these two shops had been removed prior to 1957 and some new pits had been constructed in each of the shops (Ex. "C" with affidavit filed by Mr. Scholl R. 47).

This action does not involve any question as to the right of the Railroad Company to increase the amount of work being done in the South Louisville Shops, East of the division fence or even the right to diminish the amount of work performed West of this division line. It only involves the right of the Railroad Company (with no protest from the bargaining representatives) to eliminate a point where it maintains seniority rosters, but perform exactly the same work with men from the same crafts at the same geographical location (West of the division line) with employees from different seniority rosters.

Counsel for the Carrier have continuously attempted to describe the petitioners' position as being a claim for the right to jobs in a different geographical location. An examination of the allegations of the Complaint in Equity (R. 12-38) and the Amended Complaint in Equity (R. 54-68) will demonstrate that no claims have been made by petitioners to any rights within the Shops area, East of the division fence. The carrier's counsel are thus bringing in an issue presented to the Adjustment Board, as to dovetailing rosters from different Shops. Dovetailing is not involved in this action.

The request made, October 15, 1962 by Unions for the employees for specific changes, includes provision

(c) with respect to employees displaced or deprived of employment as a result of changes in the operations of the individual carrier. The agreement on May, 1936, made at Washington D. C. is an agreement which relates primarily to the dislocation of employees on the consolidation of two or more carriers. The employees seek now to have the same kind of protection in cases where one Railroad Company either transfers work, abandons or consolidates facilities, contracts out work or makes changes in work assignments or operations other than those resulting solely from decline in volume of traffic.

This request shows that the modernization of the railroad operation is bound to include the abandonment of some work areas and the consolidation of facilities. The employees recognize that some of the collective bargaining agreements do not sufficiently protect the employees in cases of such transfer, consolidation or discontinuances.

Changes of the type made by the laying off of all the employees on the Roundhouse rosters, for a *supposed* force reduction, which did not occur, would be covered by such alterations requested by the employees. Fortunately for the employees listed on the Roundhouse rosters, they had geographical protection up through February 17, 1957. The Railroad Company might have discontinued that shop but it did not, and so long as the work continued in the geographical area, the contract gave to the employees on the Roundhouse rosters the priority in job assignment there. In other words, with the particular agreements then in

effect on the Louisville and Nashville Railroad, the shop employees were protected from displacement within a geographical area by the geographical point seniority system. The employees over the country generally now desire protection such as the L. & N. had given to its Shop employees in the South Louisville Yards, through the point seniority system. This is now requested in the proposals submitted by the representatives of the employee organizations.

On the other hand, in the so-called modernization of agreements the carriers seek the right now to transfer work from one facility to another without interference, the right to partially abandon any operation and to consolidate facilities heretofore operated independently and the right to make effective any other changes in work assignments or operation. By this last cover-all provision, the carriers seek to eliminate the effect of any provisions providing for point seniority rights.

By point 2 (b) under the heading of MODERNIZATION OF AGREEMENTS TO MEET CHANGING CONDITIONS the carriers propose that, where changes involve consolidation, merger or elimination of one or more seniority districts, the carrier shall give thirty days notice to the affected organization or organizations. The rest of subsection (b) is devoted to the question of reaching an agreement between the carriers and the employees' organization. The second sentence of subsection (b) provides:

> "All parties affected by the change shall, before expiration of the notice period, engage in

joint negotiations in regard to the consolidation, merging or elimination of one or more seniority districts."

This entire subsection (b) recognizes the fact that existing collective bargaining agreements may have provisions with binding effect in geographical areas, and that the carrier, in consolidating or abolishing such districts, may have to recognize the property rights of the employees to seniority, which would be destroyed or otherwise seriously impaired for the future. These rights are similar to those which arise with labor organizations covered by labor agreements in other fields. Remuneration for the loss or impairment of these rights has been definitely recognized in these other fields.

Such changes might transfer seniority rights or include other advantages or remuneration to compensate the displaced employees. The present agreements contain no provision for notice and were not subject to change, without notice except by agreement.

These are just the type of negotiations necessary when changes in contracts are desired or needed, as apparently was true in the overnight displacement of the entire Roundhouse personnel. That is where major controversies exist, and negotiations are required, rather than arbitrary unilateral action of a carrier. The failure of the Railroad Company to recognize its obligation to negotiate a major controversy caused the situation here requiring a declaration of rights as to jobs in the Roundhouse Area *after February 17, 1957.*

THE CARRIERS' PENDING PROPOSALS MIGHT TERMINATE EXISTING CONTRACTS AS TO POINT SENIORITY.

The foregoing discussion has demonstrated that both the carriers and the unions recognize that modifications in the various bargaining agreements are needed. They further recognize that the changing of the bargaining agreement is a major controversy within the meaning of the Railway Labor Act. They have even sought the aid of the National Mediation Board which handles major controversies when called upon.

When the Louisville and Nashville Railroad Company decided to combine the operation of its two South Louisville Shops, it arbitrarily disregarded the contract rights of the Roundhouse employees under the point seniority provisions of the bargaining agreements. For some reason it used the expression "force reduction," but the allegations of the Complaints in this case, and the facts otherwise presented, show that this was subterfuge. What the Railroad Company needed then, is what it needs now, to procure a modification of its contract, so that by negotiations or otherwise it may provide for proper recognition of accrued seniority rights and for remuneration of any impairment of these rights. Its position is in no way strengthened by the statement of its counsel that if the Railroad Company in the future decides to use the Roundhouse area, it may use the Roundhouse rosters (when in fact the Railroad Company is now using all the time in the Roundhouse area, employees from other seniority rosters).

The suggested modernization change in rules in the carriers' suggestion 3(b) is exactly what the parties to the present agreements, both with the skilled employees and the unskilled employees, needed in February, 1957. The employees on the Roundhouse rosters had a right to have their seniority recognized in accordance with principles well established by court decisions in the State of Kentucky. The Railroad Company now seeks to provide a method by which such agreements can be changed to some other arrangement through negotiation with notice and provision for a final and binding determination by an arbitration board. The method suggested is a fair and just approach, and it is a definite and specific recognition of exactly what the parties to these contracts had a right to expect, and to receive, in 1957. The unilateral change in the application of the contract so as to eliminate the use of the Roundhouse rosters, but to use the area for other employees, means that the Railroad Company failed to recognize its legal duties in reference to a major controversy, and shows now that it should have then sought a contract change, instead of arbitrarily violating its agreement with discrimination against the 66 employees on the Roundhouse rosters.

By this method of amending the agreement so as to provide for arbitration and a binding agreement with reference to property rights, the Railroad Company is now recognizing the existence of the rights of the employees on the Roundhouse rosters. This new approach demonstrates the contract violations now as

well as at all time since 1957. If this action is reversed and the discarded employees have an opportunity for recognition of their seniority rights, they may find that some agreements will be made with reference to these rights through methods provided by the very negotiations now in progress. But if the negotiations do bring such a change, it will be with the Railroad Company dealing with petitioners as contracting parties, and with a sense of fair treatment of its long time employees, who now are continuing to have to suffer from the arbitrary action of the Railroad Company in changing the method of operation in the Roundhouse area overnight in February, 1957, without any consultation even with the employees laid off.

The proposals for modernizations of Rules, etc. contained as one of the conditions needing changes in the agreements, "Starting Time". That feature of working conditions is a primary one, but it is not any more so than following contract provisions according seniority rights in specific geographical area.

Hardly could there be a situation involving a clearer issue as to changing the terms of a contract, than where a contract, through recognition by all parties concerned, meant one thing for over 12 years, then one party assumed to change the operation of the contract by arbitrary unilateral act, discriminating against all employees on seniority rosters for the area.

JEFFERSON CIRCUIT COURT HAS JURISDICTION.

This action was brought in the Jefferson Circuit Court in Kentucky. That is a court of record with general civil jurisdiction (KRS 23.010). The action is brought for a declaration of rights, as authorized by legislation in Kentucky (Ky. RCP 57; KRS 418.040-418.090). The Jefferson Circuit Court denied jurisdiction, but on the grounds that the jurisdiction of the National Railroad Adjustment Board was exclusive and that its finding is final. It is important in this consideration that the Chancellor never examined the issues decided by the Adjustment Board or as to whether the issues were within that Board's jurisdiction.

The Chancellor went even further in this case in denying jurisdiction of the claims against the Unions. His opinion says in part (R. 72; Pet. for Cer. App. A. Item 4, p. 4a):

> "Unions cannot discriminate against plaintiffs for some invidious reasons such as race or religion, but freedom from discrimination does not require that the union in every grievance agree with its aggrieved member. Justice requires that the aggrieved party have an opportunity to be heard before a proper tribunal. These requirements have been fulfilled."

That Court erred right there for the Railroad Adjustment Board had no jurisdiction as between an employee and the Union, which is his bargaining agent.

and the respondent Unions were not parties before that Board. The Courts alone have jurisdiction.

Steele v. L. & N. R.R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173;
Conley, et al. v. Gibson, 335 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80.

Nor did the National Railroad Adjustment Board have jurisdiction of the issues presented for declaration of rights. The primary question arose from the carrier by its unilateral arbitrary decision applying the agreement, as to geographical point seniority, as meaning the employees on the rosters for the Roundhouse area have seniority through February 17, 1957, but *thereafter* as meaning employees from other rosters would take over.

It was the carrier's duty then to seek an amendment to its existing contracts. This rule is applicable not only to altering a written collective bargaining agreement, but to actions in interpreting and applying such an agreement. Conley, et al. v. Gibson, et al., cited *supra*.

The issue as to dovetailing which was taken to the Adjustment Board was an attempt at adjustment by possible extension of priority rights to the Roundhouse employees as well as to the Shops employees, as had already occurred. This was not in the contract, and it is not involved in this case.

Voluntary construction by the parties for a substantial period of time has always been recognized as most persuasive evidence of intent. Here we have

this in two relationships. The Louisville and Nashville established the Roundhouse Shop about 1900. The present bargaining agreements were applied by the parties as meaning that the employees working in that shop had seniority rights there from start of employment, some as far back as 1922 and 1923. This should have been long enough for the employees on those rosters to have been consulted first, even if the Shops were to be discontinued. But the unilateral decision of the carrier was, not to discontinue work there, but to issue misleading bulletins as to "force reductions," then to use the Roundhouse area for employees from other rosters for the same work, immediately and without loss of shift.

The other voluntary interpretation applies not to the contract but to the procedure for changing contract rights. In 1957 the carrier attempted unilateral action which made the accrued seniority rights in a geographical area practically (if not entirely) worthless. Now in 1962 and 1963 this same carrier is recognizing that to change working rules, it should give 30 day notice and negotiate, with arbitration, if necessary. We respectfully insist that without negotiation or other such procedure, the carrier had no right to violate its contracts, which it had respected for years.

The arbitrary discrimination and violation of petitioners' constitutional rights, which the carrier produced then, continues as to jobs under those contracts today and tomorrow. The principles announced in the Steele and other cases, recognize that petitioners were entitled to *their day in court* on violation of ac-

crued seniority property rights. A non-lawyer Adjustment Board could not give this. We respectfully ask that this action be reversed for a declaration of rights as to protection of property rights under the Constitution, and as to manifest discrimination, as even the Chancellor recognized.

Respectfully submitted,

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